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Before the
Federal Communications Commission
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	
Table of Allotments	)	MB Docket No. 02-136
FM Broadcast Stations	)	RM-10458
(Arlington, The Dalles, and Moro, Oregon,	)	RM-10663
and Covington and Trout Lake, Washington)	)	RM-10667
	)	RM-10668

To: Assistant Chief, Audio Division
Media Bureau

SUPPLEMENT

Mid-Columbia Broadcasting, Inc. ("Mid-Columbia"), licensee of Station KMCQ(FM), The Dalles, Oregon; First Broadcasting Company, L.P. ("FBC"); and Saga Broadcasting Corp. ("Saga"), licensee of Station KAFE, Bellingham, Washington (together, "Joint Parties") respectfully submit this Supplement to address new points raised for the first time in reply comments in this proceeding. This Supplement is accompanied by a separate motion for its acceptance. In support hereof, the Joint Parties state as follows:

1. On March 25, 2003, Triple Bogey, LLC, MCC Radio, LLC, and KDUX Acquisition, LLC ("Triple Bogey") filed reply comments in this proceeding. In those reply comments, Triple Bogey argues that the Joint Parties' amended proposal should be dismissed (i) pursuant to the Commission's *Taccoa, Georgia*[1] policy, citing a recent case in that regard; and (ii) pursuant to the Commission's *Refugio, Texas*[2] decision regarding "backfill" allotments.[3] As

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1 The Commission does not permit a party to submit a counterproposal to its own proposal absent an explanation why the new proposal could not have been submitted in the initial petition for rule making. *Taccoa, Sugar Hill, and Lawrenceville, Georgia,* 16 FCC Rcd 21191 (2001).

2 FCC 03-18 (rel. Feb. 11, 2003).

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will be discussed, Triple Bogey's *Taccoa* argument would create a conundrum if applied here and its argument concerning the *Refugio* decision misconstrues past case law.

I. Dismissal of the Joint Parties' Amended Proposal Would Violate the Joint Parties' *Ashbacker* Rights.

2. The Joint Parties have already explained why their amended proposal for Kent, Washington could not have been advanced in their initial petition, and do not attempt here to repeat or expand upon those arguments. However, Triple Bogey argues in reply that the Commission should *dismiss* the Joint Parties' amended proposal and not subject Triple Bogey's proposal to a new filing period for counterproposals, citing *Bridgeton and Elmer, New Jersey* (DA 02-3455), 17 FCC Rcd 25136 (2002). That remedy is not available to the Commission.

3. The Commission cannot dismiss the Joint Parties' amended proposal because it is in conflict with Triple Bogey's counterproposal (as well as other counterproposals in this proceeding) and was filed on the same day. As such, it is entitled to comparative consideration with the other timely filed proposals with which it is in conflict. *See Ashbacker Radio Corporation v. FCC*, 326 U.S.327 (1945) (Commission must afford procedural fairness to similarly situated applicants); *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 8 FCC Rcd 4743, 4745 (1993) (*Ashbacker* extends to timely filed, mutually exclusive petitions for rule making). The Commission could, of course, dismiss all of the proposals in this proceeding and start again from scratch, but nothing would be gained thereby since on refiling the Commission would still be faced with the same set of mutually exclusive proposals. *Bridgeton, New Jersey*, cited by Triple Bogey, does not demand any different result. In that case, the Commission dismissed a petitioner's amended proposal, but

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[3] Triple Bogey also argues, as it did before, that the Commission can properly impose a directional antenna upon a licensee without the licensee's consent. The Joint Parties have already addressed this argument in their Reply Comments and need not do so here.

there were no other proposals in the proceeding. Moreover, the Commission subsequently issued a new Notice of Proposed Rule Making with a new docket number. Triple Bogey focuses only on the dismissal remedy, ignoring the further procedures ordered in that case. But the Commission cannot dismiss an otherwise acceptable proposal while allowing a mutually exclusive proposal to go forward consistent with *Ashbacker* and its progeny. This is basic procedural fairness.

4. Indeed, the *Bridgeton* case is distinguishable on its facts from the situation here. In *Bridgeton*, the assignment of license (the changed circumstances relied upon by the rule making proponent) took place in the intervening period before the comment date, and the Commission held that the buyer could have amended its proposal earlier. If it had done so, the Commission would have issued a Notice of Proposed Rule Making based on the amendment. Here, the Joint Parties demonstrated that the willingness of KAFE to agree to a new channel based on changes in Canadian policy with respect to the short spaced Canadian stations did not occur prior to the Commission's issuance of the Notice of Proposed Rule Making. Thus, it was not possible for FBC and Mid-Columbia to present their amended proposal at an earlier date.

5. The Commission's purpose in instituting the *Taccoa* policy was to avoid one party's abuse of the procedural rules to unfairly prejudice other potential proponents. But in doing so, the Commission has placed itself in a quandary. It has not yet been faced with a situation in which mutually exclusive proposals, including the petitioner's amended proposal, are filed in one proceeding. If the Commission issues a new Notice of Proposed Rule Making, as it did in *Bridgeton, New Jersey, supra*, it must include all of the counterproposals in the proceeding in that Notice (failure to do so would violate *Ashbacker* for the reasons given above). However, a party believing itself disadvantaged in a comparative analysis would have the incentive to

amend and improve its comparative position. The Commission would then be required to decide whether that party had given sufficient reason to amend at the subsequent comment date. Regardless of the outcome of that decision, the resulting delay will work to that party's advantage. Moreover, the Commission could conclude that there *was* sufficient reason to amend, and issue yet another Notice of Proposed Rule Making with a third docket number. The cycle could continue without limit, because another party would be presented with the same incentives in the third proceeding to regain its comparative advantage. Thus, while trying to avoid gamesmanship, the Commission has inadvertently created the opportunity and incentive to engage in the very behavior it was trying to discourage.

6. In solving this conundrum, the Commission should not simply issue a new Notice of Proposed Rule Making stating that the parties whose proposals are set forth in the Notice shall not amend. This pronouncement would be hollow if there were valid reasons for amending, such as a recent spectrum change. Certainly the temptation will be for at least one of the parties to find a reason to amend, for the reasons discussed above. On the other hand, the Commission could recognize that its *Taccoa* policy, like many of its policies, has a limited benefit, since there are very few occurrences of the problem it is designed to correct. Indeed, since the November, 2001 release of the *Taccoa* decision, there has been only one case, *Bridgeton, New Jersey*, in which the Commission has had to apply the *Taccoa* policy, and in that case there were no conflicting proposals filed. In situations like this one, where conflicting proposals are on file, the Commission should not issue a new Notice of Proposed Rule Making, but rather issue a Public Notice, as it did here. If no new party complains in reply comments that it was precluded from filing a counterproposal due to the amended proposal, then the Commission can act without a new Notice of Proposed Rule Making. However, if a new party was precluded, it should be

permitted to file its conflicting proposal at the reply date by demonstrating that its proposal conflicts only with the amended proposal and not with the original proposal.

7. Thus, the Commission's best course of action here is simply to process the proposals before it in this proceeding. The public has had adequate notice and opportunity to participate in this proceeding. *See Benjamin, Texas*, 17 FCC Rcd 10994 (2002). Any other alternative solutions would result in further uncertainty and incentives to "game" the system.

II. A Vacant Allotment is Sufficient to Prevent the Creation of White or Gray Area.

8. In relocating Station KMCQ from The Dalles, Oregon to Kent, Washington, the Joint Parties were concerned with the possibility that some areas could have been left with no aural reception service (white area) or one aural reception service (gray area). In order to avoid the creation of white or gray area, the Joint Parties proposed three new allotments (Channel 283C1 at Moro, Oregon, Channel 261C2 at Arlington, Oregon, and Channel 226A at Trout Lake, Washington).[4] Triple Bogey argues that the Commission's recent decision in *Application of Pacific Broadcasting of Missouri LLC for Special Temporary Authorization to Operate Station KTKY(FM), Refugio, Texas* ("*Refugio*")[5] bars the use of fill-in allotments to prevent the creation of white and gray areas. *See* Reply Comments of Triple Bogey at 14-15.

9. Triple Bogey is wrong. In *Refugio*, the Commission directed the staff to cease the practice of allotting "backfill" allotments to avoid the loss of a community's sole local aural transmission service when a station changes its community of license. The Commission has long required that a backfill station be constructed and placed on the air before a community's sole

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[4] Even with these three allotments, a small area remains with no reception service, but it is unpopulated, and so does not raise concerns. *See Old Forge and Newport Village, New York*, 13 FCC Rcd 14001 (1998).

[5] *Memorandum Opinion and Order,* FCC 03-18 (rel. Feb. 11, 2003).

existing and operational station may relocate.[6] In recent years, this requirement has caused hardship and taxed the Commission's resources, since the allotment process has been backlogged by auction concerns and rule making proponents have endeavored to implement their changes through applications for special temporary authority. The *Refugio* policy is simply a way for the Commission to avoid additional problems of this nature in the future.[7]

10. However, the problems that led to the *Refugio* policy in community of license cases – *i.e.*, delays in activation of new allotments and potential abuse of STA process – have no bearing whatsoever on the use of vacant fill-in allotments to preserve reception service. The Commission's policies with respect to the preservation of transmission service and reception service are different, and serve different goals. Whereas the Commission has never considered a vacant allotment to be an adequate replacement for an existing, operating transmission service,[8] vacant allotments have always been considered as adequate reception service replacements for the purpose of white and gray area coverage.[9] For this reason, the elimination of white and gray areas is not required to await the activation of a station, and Triple Bogey fails to cite any case in which the Commission has delayed the implementation of a change in community of license

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6 *See Barnwell, South Carolina et al.*, 17 FCC Rcd 18956 (2002) (requiring activation of replacement service before relocation of existing station); *Alva, Mooreland, Tishomingo, Tuttle, and Woodward, Oklahoma*, 17 FCC Rcd 14722 (2002) (granting change in community of license only when replacement service had commenced operation at Tishomingo); *Refugio and Taft, Texas*, 15 FCC Rcd 8497 (1997); *Llano and Marble Falls, Texas*, 12 FCC Rcd 6809 (1997); *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990) ("*Community of License*").

7 *See Barnwell, South Carolina, supra* (refusing to grant interim STA to serve new community).

8 *See* cases cited *supra*, footnote 5. *Cf. Rangely, Silverton and Ridgway, Colorado*, 15 FCC Rcd 18266 (2000), *recon. denied*, 16 FCC Rcd 6953 (2001) (applying different criteria when station being removed has not been activated).

9 *Greenup, Kentucky and Athens, Ohio*, 6 FCC Rcd 1493 (1991). *See Nogales, Vail and Patagonia, Arizona*, 16 FCC Rcd 6935 (2001) (counting vacant allotment at Rio Rico, Arizona); *Meeker and Craig, Colorado*, 15 FCC Rcd 23858 (2000).

until a channel is activated to cover white or gray area. Instead, white and gray areas are eliminated as soon as an allotment is made. *See Greenup, Kentucky, supra*, 6 FCC Rcd at 1494 (recent new allotments obviate a claim of gray area coverage). Therefore, the considerations that led the Commission to announce its *Refugio* policy with respect to community of license cases are not present when white and gray areas are at issue.

11. A review of the cases cited by Triple Bogey reveals that it confuses the different policies with respect to transmission and reception services. *Community of License, supra*, cited by Triple Bogey, applies to changes in community of license, not to the replacement of reception service. *See Refugio and Taft, Texas*, 14 FCC Rcd 11609 at n. 3 (1999) (Notice of Proposed Rule Making) (vacant allotments are not considered existing services for change of community purposes, but are considered existing services for other purposes). *Pecos and Wink Texas*, 14 FCC Rcd 2840 (1999), cited by Triple Bogey, actually undermines its case. There, an unbuilt construction permit was considered as providing white and gray area coverage, and no delay in the activation of a new community service was required. *See also Cheyenne, Wyoming and Gering, Nebraska*, 15 FCC Rcd 7528 (2000) (removal of authorized but unbuilt station creates gray area); *Littlefield, Wolfforth and Tahoka, Texas*, 12 FCC Rcd 3215 (1997), *partial recon. granted on other grounds*, 15 FCC Rcd 5532 (2000). Thus, the cases all support the principle that the creation of white or gray area is avoided when an allotment is made, and this procedure does not delay the implementation of a change in community of license.

WHEREFORE, for the foregoing reasons, the Commission should find that the Joint Parties' amended proposal for Kent, Washington best furthers its allotment priorities, and should grant the proposal.

Respectfully submitted,

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April 28, 2003

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